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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

**No. 742**

HARRY KAISER and SUSAN KAISER,

*Petitioners,*

*vs.*

THE STATE OF NEW JERSEY,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of New Jersey**

## PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

JOHN J. CORCORAN, JR.,
*Attorney for Petitioners.*
15 Exchange Place,
Jersey City 2, New Jersey.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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Petitioners petition the Court for a rehearing of their application for a Writ of Certiorari to review the judgment of the Superior Court, Appellate Division of the State of New Jersey, entered on May 14, 1962, affirming the convictions of Petitioners in the Bergen County Court, Law Division, on May 18, 1961 and also the judgment of the Superior Court, Appellate Division of the State of New Jersey, entered on July 17, 1963, affirming the denial by the Bergen County Court, Law Division, of Petitioners'

motions to vacate the judgments of conviction and for a new trial, rendered on December 9, 1962.

1. The Petition for Certiorari herein sought review of the Appellate Court decisions on the grounds that the New Jersey State courts have refused to give any consideration on the merits to Petitioners' federally protected constitutional claims of illegal search and seizure under a conceded, deficiently issued, search warrant; that the assigned reason for doing so, that is, because those claims were not raised on direct appeal, is unwarranted, and unsupportable for, as the *record stood* when the case was first before the Appellate Division on appeal and before the New Jersey Supreme Court on Petition for Certification, the violation of their constitutional rights against illegal searches and seizures could not be successfully urged under existing New Jersey precedents and prevailing rules of practice, which only permitted error in the admission of evidence to be raised on appeal if specific objection was made thereto at the trial.

The Petition for Certiorari herein was filed and served on January 9, 1964. The Brief in Opposition by the respondent, the State of New Jersey, was filed and served on March 11, 1964. Petitioners' Reply Brief was filed and served on March 17, 1964. The Court considered the Petition for Certiorari on these papers.

On March 23, 1964, the Court denied certiorari. The time for filing a Petition for Rehearing will expire on April 17, 1964.

The Superior Court of New Jersey, Appellate Division, filed an opinion affirming the convictions of Petitioners which appears in 74 N. J. Super. 257, 181 A. 2d 184 and also filed an opinion affirming the denial by the Bergen County Court, Law Division, of Petitioners' motions to vacate the judgments of conviction and for a new trial, which

appears in 80 N. J. Super. 176, 193 A. 2d 270. The Bergen County Court, Law Division, GALANTI, Judge, filed an opinion denying Petitioners' motions to vacate the judgments of conviction and for a new trial which opinion is unreported but which is printed as Appendix C to the Petition for Certiorari at 25a.

2. Petitioners now petition the Court for a rehearing of the order denying certiorari.

The grounds for this Petition for Rehearing are: At the time the Petition for Certiorari was filed by the Petitioners herein on January 9, 1964, Petitioners were not aware at that time that there was a conflict of decision between the decisions of the United States Circuit Court of Appeals for the Ninth Circuit and the Circuit Court of Appeals for the Fifth Circuit on whether the holding of this Court in *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 1081 (1961), was to be given retroactive effect in State court proceedings to pre-*Mapp* convictions, where it appeared from the record made, that the search and seizure were illegal and the illegally seized evidence had been admitted in the state court trial which had resulted in the conviction of the defendant; the Ninth Circuit Court of Appeals holding (in *People of State of California* v. *Hurst*, 325 F. 2d 891 decided December 19, 1963, rehearing denied January 27, 1964), that retroactive effect was to be given to the *Mapp* holding to pre-*Mapp* convictions in state courts (as was contended for by Petitioners herein in their Petition for Certiorari) and the Fifth Circuit holding (in *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (1963)) that retroactive effect was not to be given to the *Mapp* holding to pre-*Mapp* convictions in the State Courts, even though the evidence on which the conviction rested may have been illegally secured, as this last is now understood in the light of the holdings in *Mapp* v. *Ohio*, *supra* and in the case of *Wolf* v. *Colorado*, 338 U. S. 25.

Petitioners herein became aware of this conflict of decision when the decision in *People, etc.* v. *Hurst, supra*, was published in the advance sheets of Federal Reporter Second on February 17, 1964, following the denial of rehearing therein on January 27, 1964. Petitioners then raised the point of "conflict of decision" in their Reply Brief, filed on March 17, 1964, and called attention of the Court in their Brief to that decision (*People, etc.* v. *Hurst, supra*) and when and where it was published.

Petitioners have most recently learned that the State of California has filed a Petition for Certiorari in this Court on March 13, 1964 (*People of the State of California* v. *Hurst*, No. 913 Oct. Term, 1963) 32 U. S. L. W. 3323), for review of the decision by the Circuit Court of Appeals for the Ninth Circuit in that case. The question(s) brought up for review by that Petition for Certiorari are:

> (1) The retroactive effect to be given in collateral *habeas corpus* proceedings to the *Mapp* decision to pre-*Mapp* convictions in the state courts, where the conviction was obtained on illegally secured evidence and
>
> (2) The lack of reasonable and probable cause to make the arrest and to seize the evidence in the absence of a search warrant.

The first question raised is similar in all respects to the question(s) raised by the Petitioners herein in their Petition for Certiorari, the only difference being that the result in the *Hurst* case is exactly the opposite of the result reached by the New Jersey Courts in the case of these Petitioners, the New Jersey holding being in keeping with the decision of the Fifth Circuit Court of Appeals in the *Linkletter-Walker* case, *supra*.

Both the *Hurst* case and Petitioners' case concern the retroactive effect to be given to the *Mapp* decision to pre-*Mapp* convictions in the State courts, where evidence admitted at the trial of defendants was illegally searched for and seized; the decision of the Circuit Court of Appeals in the *Hurst* case holding that retroactive effect is to be given to pre-*Mapp* convictions in the state courts; the decision of the Appellate Division of the New Jersey Superior Court in Petitioners' case holding to the contrary that retroactive effect need not be given to pre-*Mapp* convictions, unless raised by defendants on direct appeal.

The Petition for Certiorari in the case of *People* v. *Hurst, supra,* is now on the files of the Court, awaiting the coming in of the respondent's Brief in Opposition.

## Argument

As "conflict of decision" is raised in the *Hurst* case, *supra,* as a ground for the allowance of the Writ to review the decision in that case, Petitioners herein conceive that the Court will allow certiorari to review that decision, in order to take opportunity on review to resolve the existing conflict of decision between the decisions of the Ninth and Fourth Circuits on the one hand and the Fifth Circuit on the other as to the retroactive effect to be given to pre-*Mapp* convictions in the State Courts.

It is urged that if the Court was to grant certiorari in the *Hurst* case, review on the merits in Petitioners' case would also be appropriate and that both cases should be jointly heard together after full briefing on the merits.

That review and resolution of the question presented by the two decisions, involving as they do a common question of federal law, that is "the retroactive effect to be given to pre-Mapp convictions in the State courts obtained on illegally secured evidence", should not be confined to re-

view in the *Hurst* case but should extend equally as well to the case of these Petitioners and, for the reasons urged, the Order of the Court, denying certiorari herein, should be reopened and set aside and certiorari allowed herein if certiorari is granted in *People etc.* v. *Hurst*, No. 913, Oct. Term, 1963.

Respectfully submitted,

JOHN J. CORCORAN, JR.,
*Attorney for Petitioners.*

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**Certificate**

I, the undersigned, attorney for Petitioners, do hereby certify that the foregoing Petition for Rehearing is prepared and filed in good faith for the causes stated therein and is not presented for the purpose of delay.

I further certify that the petition is restricted to the ground that if certiorari is allowed in the case of *People etc.* v. *Hurst*, No. 913, Oct. Term 1963, filed subsequent to the Petition herein, review would be equally appropriate in this case, as both cases involve the same common question of federal law, though opposite results were reached in each.

JOHN J. CORCORAN, JR.,
*Attorney for Petitioners.*